171

No. 10-97

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

PATRICK J. LYNCH AND THE PATROLMAN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Petitioners,

-v-

THE CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, AND POLICE COMMISSIONER RAYMOND W. KELLY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

Where petitioners have taken inconsistent positions on their need for additional discovery, and where neither of the lower courts has reached the merits of the issue petitioners' propose for this Court's review, should this Court nevertheless grant this petition?

If so, where the evidence presented to the District Court demonstrated that respondents imposed the mandatory breathalyzer tests at issue primarily to ensure a sober police force, thereby advancing public safety and the integrity and safety of the force, and where the primary purpose is not to generate evidence for law enforcement purposes, was there a "special need" for that initiative, and did the Second Circuit Court of Appeals correctly affirm the District Court's denial of petitioners' motion for a preliminary injunction?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED 1

TABLE OF AUTHORITIES iv

COUNTER-STATEMENT OF THE CASE 1

A. Monitoring alcohol use by NYPD officers 2

B. NYPD officers also routinely undergo testing for substance abuse 3

C. Evidence of alcohol-related incidents in the Department 4

D. Firearms discharges by NYPD officers 5

E. Investigation procedures for shootings 6

F. The Sean Bell shooting 9

G. The implementation of IO 52 10

H. IO 52 is not a law enforcement initiative 12

I. This Action 13

THE DISTRICT COURT'S ORDER 14

THE ORDER OF THE SECOND CIRCUIT 16

REASONS FOR DENYING THE PETITION 19

THE SECOND CIRCUIT'S DECISION AFFIRMING THE DISTRICT COURT'S ORDER DENYING PETITIONERS' MOTION FOR A PRELIMINARY INJUNCTION IS LEGALLY CORRECT AND DOES NOT CONFLICT IN A MEANINGFUL WAY WITH ANY DECISION OF THIS COURT, ANOTHER COURT OF APPEALS, OR OTHERWISE WARRANT FURTHER REVIEW BY THIS COURT 19

I. Having failed to move for summary judgment, and having opposed respondents' cross-motion for summary judgment with a claimed need for discovery, petitioners' request for a decision on the merits now is irreconcilable with their prior positions 19

II. Petitioners ignore ample evidence of a special need for IO 52 in order to frame an issue worthy for this Court's review 22

CONCLUSION 31

TABLE OF AUTHORITIES

Cases	Pages
American Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co., 148 U.S. 372 (1893)	21
Cassidy v. Chertoff, 471 F.3d 67 (2d Cir. 2006)	23, 24
City of Indianapolis v. Edmond, 531 U.S. 32 (2000)	24
Dickerson v. Napolitano, 604 F.3d 732 (2d Cir. 2010)	25
Ferguson v. City of Charleston, 532 U.S. 67 (2001)	25, 26, 27
Gillespie v. U.S. Steel Corp., 379 U.S. 148 (1964)	22
Greene v. Camereta, 588 F.3d 1011 (9th Cir. 2009)	29
Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916)	21

Knox County Education Association v. Knox County Board of Education, 158 F.3d 361 (6th Cir. 1998) 29

Land v. Dollar, 330 U.S. 731 (1947) 22

Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) 22

Lynch v. City of New York, 589 F.3d 94 (2d Cir. 2009) ..... *passim*

MacWade v. Kelly, 460 F.3d 260 (2d Cir. 2006) 23

Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) 17, 18, 23

New York v. Burger, 482 U.S. 691 (1987) 28

Palladino v. City of New York, 2008 U.S. Dist. Lexis 86757 (SDNY Sept. 30, 2008) ..... *passim*

Rescue Army v. Mun. Court of Los Angeles, 331 U.S. 549 (1947) 21

Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 621 (1997) 14, 18, 24, 25

United States v. Rendon, 607 F.3d 982 (4th Cir. 2010) 24

United States v. Gen. Motors Corp.,
323 U.S. 373 (1945) 22

Va. Military Inst. v. United States,
508 U.S. 946 (1993) 21

Yeager v. United States,
129 S. Ct. 2360 (2009) 22

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COUNTER-STATEMENT OF THE CASE

The New York City Police Department ("NYPD") has approximately 35,000 uniformed members of the service, including officers in all ranks, from Police Officer to Chief (A64, ¶3).[1] All of those officers are empowered to make arrests (*Id.*).

[1] Unless otherwise indicated, parenthetical references refer to pages in the Joint Appendix in the Court of Appeals.

Most are required to carry handguns and are authorized to use them if that becomes necessary in the course of the officer's duties (*Id.*).

A. Monitoring alcohol use by NYPD officers.

Due to the responsibilities and powers vested in each NYPD officer, the NYPD closely regulates and monitors its officers (A64, ¶4). Uniformed members are required to be fit for duty 24 hours a day, except when on sick report (A64, ¶6). To the extent that it renders them unfit for duty, they are not permitted to drink alcohol (A64-65, ¶¶7-10).

The Department considers drinking on the job to be a grave dereliction of duty. Any uniformed member who causes physical injury to another person while operating a motor vehicle, and is determined to be unfit for duty due to the consumption of alcohol, will ordinarily be terminated (A65, ¶8). At the very least, that officer will be placed on dismissal probation, which means that he or she can be terminated during the probationary period without a hearing or further process (*Id.*, at ¶9).

Any officer placed on dismissal probation under the foregoing circumstances will be subject to breathalyzer testing while on duty (A65, ¶10). Under that procedure, a breathalyzer test above .02 is cause for a further, more sensitive test, on an "Intoxilyzer" (A65, ¶10). If the officer tests above .04, the officer is considered unfit for duty (*Id.*).

Any officer who may be experiencing trouble with alcohol has access to confidential NYPD assistance units, including the Counseling Service

Unit (A65, ¶11). The NYPD's goal is "early detection and referral of personnel for evaluation and treatment before drinking causes problems in work performance or worse" (*Id.*)(emphasis in original).

If an off-duty officer consumes alcohol, he or she is required to take precautions to ensure that s/he does not become intoxicated while in possession of a firearm (A66, ¶12). For example, the officer can place the firearm in a locked safety box (*Id.*, at ¶13).

B. NYPD officers also routinely undergo testing for substance abuse.

During their careers, NYPD officers are also periodically subject to drug testing (A66, ¶14). For example, the officer is drug tested at the beginning and end of his or her probationary period (*Id.*). Where an officer applies for various specialty assignments, part of the screening will involve a drug test (*Id.*, at ¶15). Drug tests may also be administered if there is reasonable suspicion that the officer has ingested a controlled substance (A66, ¶16).

All NYPD officers, of all ranks, are also subject to random drug testing (A66, ¶17). NYPD officers are selected at random, and without reasonable suspicion, to provide samples for analysis for controlled substances (*Id.*).

Drug testing has a variety of goals (A66, ¶18). It protects the public from officers who may not be completely in control of themselves due to the use of controlled substances (*Id.*). Drug testing

also protects the lives of fellow NYPD officers, who rely on each other in life-threatening situations, which can arise suddenly, without warning, and which may require good judgment under the most difficult of circumstances (*Id.*). Drug testing also reinforces the public's confidence in the Department and the public's willingness to cooperate fully with the Department (*Id.*). That confidence and cooperation are essential to the mission of the NYPD (*Id.*).

C. Evidence of alcohol-related incidents in the Department.

The NYPD has long recognized that some NYPD officers may have problems with alcohol consumption (A67, ¶19). The NYPD maintains a Counseling Unit, which is concerned with possible alcohol abuse, and officers may attend the Counseling Unit anonymously, that is, without telling any member of the NYPD (*Id.*). Under certain circumstances, NYPD officers may also be directed to the Counseling Unit for an interview (*Id.*, at ¶20).

From 2005 to 2007, approximately 600 officers were interviewed by the Counseling Unit (A62, ¶9). That number included 380 officers who were new to the unit (*Id.*).

Unfortunately, the NYPD has also experienced a problem with officers being arrested for Driving While Intoxicated ("DWI") (A67, ¶21). In 2005, 10 off-duty officers were arrested for alleged DWI (*Id.*). In 2006, 16 off-duty officers were arrested for DWI (*Id.*). As of November 2007, 12

NYPD off-duty officers were arrested for alleged DWI (*Id.*).

Tragically, the NYPD has also experienced the suicide of a number of officers (A67, ¶22). From 2005-07 there were ten suicides (*Id.*). In four of those suicides, there was either alcohol present at the scene or a medical examiner's report found alcohol in the body of the deceased officer (*Id.*).

These statistics show that, on a consistent basis, NYPD officers with alcohol problems have been involved in illegal or life-threatening behaviors (A67, ¶23). The risk to the public and to fellow officers from this is real, and the NYPD has responded by, *inter alia*, providing counseling services, requiring that officers be fit for duty at all times, and requiring that a NYPD officer who is intoxicated be relieved of his or her weapon (*Id.*).

D. Firearms discharges by NYPD officers.

According to NYPD records, in 2004 there were 111 occasions, other than on the firing range, when an NYPD officer discharged his or her firearm (A68, ¶25). This figure includes on- and off-duty firings and incidents in which no one was injured and no property damaged (*Id.*). In 2005, the number of firearms discharges was 130; in 2006, the number was 119; and as of November 2007, 104 firearms discharges had occurred (*Id.*).

Every discharge of a firearm by a NYPD officer, whether on- or off-duty, that is not on a firearms range, is investigated under a firearms discharge procedure found in the NYPD Patrol Guide (A68, ¶26). Following the discharge of a

firearm, a variety of superior officers and investigators will respond to the scene of the shooting, regardless of whether an injury has resulted from the shooting (*Id.*, at ¶27). Those responding will almost always include the Patrol Borough's "Shooting Team Leader," who is a Captain or above and who leads the initial investigation of any shooting (*Id.*).

A ranking IAB officer, as well as a superior officer from the Patrol Borough in the command of occurrence will also respond, unless the incident occurs outside the City of New York (A69, ¶28). A Chief or an Inspector who is on duty specifically to supervise such investigations, called the Duty Inspector or the Duty Chief, will also respond to the scene and supervise the investigation into the firearms discharge (*Id.*, at ¶29). The office of the District Attorney for the borough where the shooting occurred will be notified, and that office may also decide to have personnel respond to the shooting (*Id.*, at ¶30). A community affairs officer will also respond (*Id.*, at ¶31).

The NYPD also maintains a Trauma Counseling Program that can offer counseling to any officer involved in a firearms discharge and who may be traumatized by the experience (A69, ¶32). The officer may also use, or be sent to, the NYPD's Psychological Services Division for evaluation (*Id.*).

E. Investigation procedures for shootings.

Additionally, and in recognition of the fact that criminal charges may result against the NYPD officer or a civilian, all shootings are treated as part

of a possible criminal investigation (A69, ¶33). Of course, whether criminal charges will result cannot be determined until the investigation is completed, and that is why the NYPD treats all firearms discharges as an investigation into a possibly criminal matter (*Id.*). Therefore, the Crime Scene Unit often responds to the scene of a shooting (*Id.*).

All shooting investigations include an initial report prepared by the Shooting Team Leader (A70, ¶34). That is followed by a final report completed by a commanding officer, a review by a Borough Firearms Discharge Advisory Board, and a final review by the Chief of Department's Firearms Discharge Review Board (*Id.*).

The initial report will contain a narrative of the shooting based on the information obtained in the preliminary investigation (A70, ¶35). Any officer who fired a weapon will have that weapon examined and inspected (*Id.*, at ¶36). For example, the number of live and spent shells will be recorded (*Id.*). Any ammunition possessed by the officer will be taken for safekeeping (*Id.*).

The initial report may also contain a preliminary evaluation of whether the discharge was within NYPD guidelines, and a recommendation of whether corrective action or disciplinary proceedings should be initiated. The report will also include information concerning any arrests made, and will record the activities of the Crime Scene Unit, which often recovers and takes custody over physical evidence found at the scene (A70, ¶¶37-38). The Crime Scene Unit may also take photographs to record the physical layout of the scene (*Id.*).

Within 90 days of the shooting, or as soon thereafter as possible, the Commanding Officer of the Borough Investigation Unit or the precinct of occurrence prepares a follow up report. This report includes findings and recommendations, the Medical Examiner's report (if applicable), the ballistics report, a synopsis of the police officer's statements, and, if applicable, District Attorney or grand jury findings as well as IAB findings (A70, ¶¶37-38).

A Borough Firearms Discharge Advisory Board reviews the incident and can sustain or alter findings and recommendations that were made earlier in the investigation (A71, ¶40). Typically, that Board has seven members, including one officer who is of the same rank as the officer who discharged the firearm (*Id.*). The remaining six members will be at or above the rank of Captain and will include the Commander of the Patrol Borough (*Id.*). The Board then prepares a report to the Chief of Department's Firearms Discharge Review Board that includes findings and recommendations (A71, ¶41).

The NYPD's Firearms Discharge Review Board is chaired by the Chief of Department and includes the Deputy Commissioner for Training, the Deputy Commissioner for Legal Matters, Chief of Personnel, an Operational Bureau Chief and the Commanding Officer of the Firearms and Tactics Section (A71, ¶42).

Any officer who discharges his firearm, whether on-duty or off-duty, and regardless of whether the shooting is justified or not, will attend an NYPD tactics review session (A71, ¶43).

The NYPD follows the foregoing protocols in all instances where a member of the service discharges his or her firearm, whether on- or off-duty, and whether or not there has been an injury to a person resulting from the discharge (A72, ¶44). Given the seriousness of firearms discharges, the NYPD goes to great lengths to investigate the event (A72, ¶45). The NYPD treats the scene of a shooting as a crime scene to protect the integrity of the evidence, and to assure the public and the NYPD's own officers that the truth of the shooting will be brought out and appropriate actions taken (*Id.*).

Appropriate action may include additional training of one or more officers, disciplinary action against the officer or, in relatively rare circumstances, a criminal prosecution (A72, ¶46).

F. The Sean Bell shooting.

On November 26, 2006, an undercover operation at a Queens nightclub, conducted by the NYPD's Organized Crime Control Bureau, ended in the shooting death of civilian Sean Bell, and the wounding of two of his companions, as the result of shots fired by NYPD officers (A72, ¶47). Three of those officers were indicted by a grand jury (A72, ¶47).

Following the incident, elected officials, the media, and community leaders raised a number of questions about various aspects of NYPD undercover operations (A72, ¶48). Against this backdrop, the Police Commissioner convened a high-ranking committee to review undercover

operations procedures and make recommendations for improvements (A73, ¶50).

On June 18, 2007, the Police Commissioner announced 19 recommendations made by the Committee for Review of Undercover Procedures (A73, ¶52). The special panel made recommendations to improve how undercover officers are recruited, trained, supervised, and retained (*Id.*).

In addition, the special panel recommended mandatory breathalyzer tests of all NYPD officers, on-duty and off-duty, whose firearms discharge results in injury or death (A73, ¶52). All 19 recommendations were publicly disseminated and announced prior to the completion of the Committee's report so that implementation of those recommendations would not be delayed (*Id.*).

G.. The implementation of IO 52.

On September 30, 2007, the Police Commissioner issued Interim Order ("IO") 52, entitled "Alcohol Testing For Uniformed Members of the Service Involved in Firearms Discharges Resulting In Injury To Or Death Of A Person" (A74, ¶54; 79). As stated in IO 52, the order's purpose is (79):

> To ensure the highest levels of integrity at the scene of police involved firearms discharges which results in injury to or death of a person, or off duty, within New York City.

IO 52 applies only if (1) there is a shooting; (2) in New York City; (3) by a uniformed member of the NYPD; (4) resulting in injury or death; (5) to a person (A74, ¶56). IO 52 is in addition to, not in place of, the investigation of firearms discharges described above (A74, ¶57).

The procedures of IO 52 are applicable even when there is little or no risk of criminal prosecution, as long as there has been a shooting by an NYPD officer in New York City that has injured a person (A74, ¶58). For example, where an officer accidentally discharges his weapon injuring himself, there is generally very little risk of criminal prosecution, and yet IO 52 is to be followed in that situation (A74, ¶58).

To be effective, a breathalyzer test must be administered very soon after the shooting (A75, ¶59). Otherwise, it will not detect alcohol (*Id.*). In short, accurate information will be lost if not collected and preserved quickly (*Id.*). Therefore, IO 52 requires that the test be administered at the scene, but also in a way that maximizes the privacy of the officer to whom the test is administered (*Id.*).

The NYPD has the necessary experience in administering breathalyzer tests, especially in the NYPD's Highway Patrol Unit, which administers breathalyzers to civilians who are suspected of driving while intoxicated (A75, ¶60). Procedures in IO 52 will take advantage of this expertise to ensure that the test is administered properly so that the results are reliable (A75, ¶61).

Under the New York State Vehicle and Traffic Law ("VTL"), an individual cannot drive

while under the influence of alcohol, as evidenced by a score of .08 on a breathalyzer test (A75, ¶62). IO 52 incorporates the same standard (*Id.*).

If the officer scores less than a .08, no further testing is done (A75, ¶63). If the officer scores a .08 or greater on the breathalyzer, then further testing will be done to determine whether the officer is intoxicated (A75, ¶64).

Any officer scoring greater than .08 will be tested on a more sensitive instrument, the Intoxilyzer (A76, ¶65). That test will be administered by the Highway Patrol District's Intoxicated Driver Testing Unit, which has experience in administering that test (*Id.*).

The results of the alcohol testing may result in discipline of the officer who has been involved in a shooting while under the influence of alcohol (A76, ¶66). The results may also be used in the criminal investigation of the shooting (*Id.*).

For all of the forgoing reasons, IO 52 also advises members not to ingest alcoholic beverages up to four hours prior to the commencement of their tour of duty (A76, ¶67).

H. IO 52 is not a law enforcement initiative.

The NYPD recognizes that some of its officers may be experiencing problems with alcohol, and that may render them unfit for duty (A76, ¶68). The alcohol problem may also surface in a more extreme manner, such as a DWI arrest or in suicide (*Id.*). The NYPD has an obligation to the public and to fellow NYPD officers to require fitness for duty and the removal of weapons of an

intoxicated officer (*Id.*). The NYPD also recognizes its duty to the officer by providing counseling services on a confidential basis and encouraging the use of those services (*Id.*).

Public confidence in the NYPD is critical to the accomplishment of the NYPD's mission of preserving and protecting the health, safety and welfare of the public (A76, ¶69). The possibility that an NYPD officer might be involved in a shooting while under the influence of alcohol undermines that trust and risks the integrity of the NYPD (*Id.*).

IO 52 serves the NYPD's interests in (1) protecting the integrity of the NYPD; (2) protecting the safety of the public and NYPD officers; (3) deterring alcohol intoxication by NYPD officers who are carrying firearms; and (4) assuring the public that one of the most important and daunting powers of the police -- the power to use deadly force when necessary -- is not being abused or used by officers who are under the influence of alcohol (A77, ¶70).

I. This Action.

In October 2007, petitioners challenged IO 52 as an unreasonable search and seizure under the Fourth Amendment (A25-26). Petitioners sought, and respondents opposed, the issuance of a temporary restraining order (A31-42), which the District Court denied (A46). They also sought a preliminary injunction (A47-58).

The following month, and detailing all the foregoing history, respondents opposed the issuance

of an injunction and cross-moved to dismiss the complaint or, alternatively, for summary judgment (A59-121). The District Court heard argument on those motions on November 20, 2007 (A143-217).[2]

The District Court's Order[3]

In denying petitioners' motion for a preliminary injunction, the District Court determined that, although petitioners had "adequately pled their claims to withstand a motion to dismiss," those allegations were insufficient to sustain injunctive relief (A223).

The District Court found that petitioners' Fourth Amendment claim was unlikely to succeed on the merits because immediate alcohol testing fell within the "special needs" exception where, as here, there is a "legitimate public safety concern" (A225). Citing to *Skinner v. Railway Labor Exec. Ass'n*, 489 U.S. 602, 621 (1989), the Court pointed to the government's interest in ensuring the public

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[2] There are two additional sets of plaintiffs who participated in the District Court motion practice but did not participate in the appeal: unions representing the ranks of detective, sergeant, and lieutenant (the "Palladino" plaintiffs) and the Captains' Endowment Association (the "Richter" plaintiffs). All the plaintiffs moved for a preliminary injunction, and the Palladino plaintiffs also cross-moved for summary judgment (A218-219).

[3] *Palladino v. City of New York*, 2008 U.S. Dist. Lexis 86757 (SDNY Sept. 30, 2008).

safety, which depends on prohibiting the use of alcohol or drugs "on duty, or while subject to being called for duty." *Id.*

The Court also found that petitioners had failed to show why that special need analysis was not applicable here (A227). Pointing out that a sober police force advances public safety and that IO 52 encourages sobriety, the Court reasoned that respondents have "a substantial interest in the safety of its citizens, visitors, and the police department" (*Id.*).

Significantly, the Court found that petitioners had failed to show that IO 52 is primarily concerned with law enforcement, a threshold showing necessary to defeat the application of the special need analysis (A227). Indeed, the Court noted, "there has been no evidence proffered that alcohol monitoring of police officers pursuant to the regulation has been used primarily for any other purpose than deterring alcohol consumption and increasing public confidence in police force action following a shooting" (Id.). Nor, the Court noted, have petitioners claimed the regulation is pretextual (A228).

The Court denied the cross-motions for summary judgment as "premature," reasoning that both the Palladino plaintiffs and respondents had "failed to make the requisite showing that no issue of material fact exists" (A222, n.4).

The Order of the Second Circuit Court of Appeals

The Second Circuit affirmed, finding that the District Court did not abuse its discretion in denying petitioners' motion for a preliminary injunction. In doing so, the Second Circuit found, based on the record, that the NYPD's breathalyzer policy "has multiple purposes," including one "directly related to the NYPD's role as an investigator of crimes" but others that are "related to 'special needs' apart from the NYPD's general interest in crime control." *Lynch v. City of New York,* 589 F.3d 94, 100 (2d Cir. 2009). After reviewing the NYPD's protocols, the Court reasoned that there are "multiple purposes of the breathalyzer policy -- some unrelated to crime control and one directly related to crime control -- and the critical question in determining whether the special needs doctrine applies is whether the NYPD's general interest in crime control is the policy's 'primary purpose.'" *Id.*, at 102.

In light of the District Court's finding that petitioners had "'proferred no evidence that [Interim Order] 52 is a regulation primarily concerned with law enforcement,' nor have plaintiffs 'shown that a primary purpose of the regulation is to generate evidence for prosecution," the Court held that the District Court "did not err in reaching that conclusion." 589 F.3d, at 102. The Court also determined that the District Court correctly applied the special needs doctrine to evaluate the IO 52, because "the mere fact that crime control is one purpose -- but not the primary

purpose -- of a program of searches does not bar the application of the special needs doctrine." *Id.*, at 94. That is because, the Court reasoned, "even if crime control is one purpose of a program of searches, the program may nevertheless be reasonable under the special needs doctrine so long as crime control is not the program's primary purpose." *Id.*, at 102.

The Court then found that IO 52 is reasonable under the three-factor special needs balancing test. As to the first factor -- the nature of the privacy interest involved -- the Court, relying on *Nat'l Treasury Employees Union v. Von Raab,* 489 U.S. 656 (1989), pointed out that the police have a diminished expectation of privacy when it comes to carrying and using firearms. 589 F.3d, at 103. Recounting the many times when NYPD officers are subject to random testing, the Court noted, "NYPD officers are already subject to drug screening as part of their employment in the NYPD, and although breathalyzer testing may be intrusive in some workplaces, the 'operational realities of the workplace' for NYPD officers 'render entirely reasonable certain work-related intrusions by supervisors and co-workers that might be viewed as unreasonable in other contexts.'" *Id.*

As to the second factor to be considered -- the character and degree of the governmental intrusion – the Court noted that "NYPD officers who discharge their weapons are, under separate, preexisting NYPD policies, already subject to close scrutiny in the form of an administrative investigation." 589 F.3d, 103-104.

As a result, the Court reasoned, the breathalyzer test is not an "unexpected intrusion

on privacy." 589 F.3d, 103, *citing Von Raab,* 489 US, at 672 n.2. Additionally, the Court found that the policy does not carry "the grave potential" for arbitrary violations of privacy because it is "applied uniformly in every situation in which an NYPD officer causes injury by firing his or her gun." *Id.*, 103-104.

As for the third factor -- the nature and immediacy of the government's needs and the efficacy of its policy in addressing those needs – the Court found the government's to be "manifest," and the policy "straightforwardly addresses those needs." 589 F.3d, 104. The Court, citing *Von Raab*, 489 U.S. at 670 and *Skinner*, 489 U.S., at 628, reasoned that "[l]ike the Customs Service employees in *Von Raab*, NYPD officers 'who may use deadly force plainly 'discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences.'" As a result, the Court found that the challenged policy is "vital to public safety," and that the NYPD has a substantial interest in both detecting and disciplining officers who violate those policies and in deterring its officers from using their firearms while intoxicated. 589 F.3d, 104. Indeed, the Court noted, "[b]y quickly and unequivocally determining whether alcohol was involved in an NYPD officer's use of his or her firearm, the breathalyzer policy will assist the NYPD in disciplining officers who use their firearms while intoxicated and will provide an incentive to officers to stow their firearms before drinking alcohol." *Id.*.

The Court then recognized that "the NYPD's reputation in the eyes of the public is directly tied

to its effectiveness as a police force." 589 F.3d, 104. To the extent the breathalyzer policy "improves the NYPD's public reputation," the Court found, "it furthers an important governmental interest." *Id.*

REASONS FOR DENYING THE PETITION

THE SECOND CIRCUIT'S AFFIRMANCE OF THE DISTRICT COURT'S ORDER DENYING PETITIONERS' MOTION FOR A PRELIMINARY INJUNCTION IS LEGALLY CORRECT AND DOES NOT CONFLICT IN A MEANINGFUL WAY WITH ANY DECISION OF THIS COURT, ANY LOWER COURT, OR OTHERWISE WARRANT FURTHER REVIEW BY THIS COURT.

Contrary to the argument petitioners urge in their petition, there is no important conflict among the Circuit Courts of Appeals or the state courts regarding the special needs doctrine, nor does this case raise any issues under this Court's opinion in *Skinner*. Rather, petitioners' contentions rest on a mischaracterization of the facts regarding the primary purpose of IO 52, as both lower courts correctly determined.

I. Having failed to move for summary judgment, and having opposed respondents' cross-motion for summary judgment with a claimed need for discovery, petitioners' request for a decision on the merits now is irreconcilable with their prior positions.

As a threshold matter, petitioners urge that this Court may dispose of this proposed interlocutory appeal on the merits because all

parties agree that the present record is sufficient for that purpose (Pet., at 10-11). They make that assertion even though they never moved for summary judgment, and despite the fact the District Court expressly denied cross-motions by both the respondents and the Palladino plaintiffs because, it found, neither had made the requisite showing that no material dispute of fact exists (A222, n.4).

And while petitioners now contend that this record is nevertheless sufficiently complete for a merits review, they opposed respondents' cross-motion for summary judgment specifically because they sought to take discovery "as to the actual, programmatic purpose of IO 52 and the extent, if any, to which IO 52 *in fact* serves the purposes advanced by the City as justifications for its suspicionless searches" (emphasis in original) (A138). In short, petitioners have expressed a consistent lack of consistency, depending on the procedural context, regarding whether the case is "sufficiently complete" for a merits review.

Not surprisingly, then, their representation to this Court, that "if the Court grants review and affirms, petitioners will dismiss their complaint" (Pet., at 11), does not foreclose yet another sea change regarding their need for discovery should this Court deny review and the matter is returned to the District Court.

Moreover, petitioners do not even ask the Court to review the propriety of the Second Circuit's affirmance of the District Court's denial of their motion for a preliminary injunction. Instead, petitioners ask the Court to address the merits of

its Fourth Amendment challenge, an issue that neither of the lower courts has had the opportunity to reach. Thus, the Court will not have the benefit of the lower courts' full consideration.

Although this Court certainly may review the merits of a case after appeal of an interlocutory judgment, the Court has generally declined to do so absent special circumstances. *See Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring)(denying a writ of certiorari because the petition "seeks our intervention before the litigation below has come to final judgment"); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("[E]xcept in extraordinary cases, the writ [of certiorari] is not issued until final decree.").

The Court's reluctance to grant review on the basis of an interlocutory order reflects its more general policy against disposing of actions prematurely or unnecessarily. *See American Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 384 (1893)("[M]any orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters. Clearly, therefore, this court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order . . . ."); *see also Rescue Army v. Mun. Court of Los Angeles*, 331 U.S. 549, 568 (1947)(reiterating that the Court "has followed a policy of strict necessity in disposing of constitutional issues" and that "perhaps the most effective implement for making the policy effective has been the certiorari jurisdiction conferred upon this Court by Congress").

Although the Court has made exceptions to this general rule against reviewing interlocutory judgments, those exceptions tend to be where, unlike here, there are fully developed legal issues "fundamental to the further conduct of the case." *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377 (1945); *see, e.g., Yeager v. United States*, 129 S. Ct. 2360 (2009)(preclusion issues from a previous trial must be determined before the present action can continue); *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148 (1964)(unresolved preemption issues govern the outcome of the litigation); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949)(jurisdictional issues must be settled before the case can proceed); *Land v. Dollar*, 330 U.S. 731 (1947)(necessary to determine whether the United States should have been the party to the suit). Here, however, there are no issues that need to be resolved by this Court before the District Court could render an opinion on the merits, and petitioners do not contend otherwise.

Thus, on this basis alone, the petition should be denied. Alternatively, the proposed issue for review is nit sufficiently compelling to warrant this Court's discretionary grant of *certiorari* review.

II. Petitioners ignore ample evidence of a special need for IO 52 in order to frame an issue worthy for this Court's review.

Petitioners' do not take issue with the Second Circuit's three-part analysis of the special needs doctrine, as the Court applied it to these facts. Instead, they once again contend that IO 52 is primarily intended to serve the ordinary needs of law enforcement (Pet., at 11-15). As both the

District Court (A227) and the Second Circuit (589 F.3d, 102) found, however, they are unlikely to prevail on that claim.

While the Fourth Amendment prohibits "unreasonable searches and seizures," the "special needs" doctrine permits searches without a warrant and without individualized suspicion. *See Cassidy v. Chertoff*, 471 F.3d 67, 74-75 (2d Cir. 2006) (reviewing cases); *see also Von Raab*, 489 U.S. 656; *Skinner*, 489 U.S. 602; *MacWade v. Kelly*, 460 F.3d 260 (2d Cir. 2006). Special needs searches are reasonable under the Constitution. *Id.*

As the Second Circuit noted, a "'program' or 'general scheme' of searches qualifies for treatment under the special needs doctrine only if the program's 'primary purpose' is not a 'general interest in crime control.'" 589 F.3d, 100. Here, respondents demonstrated that the primary purpose of IO 52 is public safety under circumstances where lethal force may be used, and personnel management, in that IO 52 (1) allows the NYPD to identify officers who endanger themselves and others by using their weapons while intoxicated, thus protecting the safety of the public as well as other NYPD officers; (2) serves as a deterrent to officers who may consider alcohol consumption while carrying their weapons; and (3) helps to build public confidence in the integrity of the police force (A77). As the Second Circuit correctly found, none of these objectives is related to crime control. 589 F.3d, 101.

Indeed, the NYPD's fundamental need for obedience among officers, and its consequent need to impose discipline for those who violate the

Department's rules and the law, necessitate such measures where, as here, officers carry weapons and are authorized to use deadly force. Officers must at all times be fit for duty, unless they are on authorized sick leave, and the drug testing the NYPD has long imposed on members of the service reflect the officer's continuing burden of readiness for the job and the good order and discipline needed for the police force. *Cf. United States v. Rendon*, 607 F.3d 982, 990-991 (4th Cir. 2010)(discussing special needs of the military).

Nor is it significant that one purpose of IO 52 is related to crime control, as the Second Circuit correctly reasoned. 589 F.3d, 102. Relying on this Court's decision in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), the Court noted that "the special needs doctrine applies to any program of searches whose 'primary purpose' is a government interest other than crime control . . . and the mere fact that crime control is one purpose -- but not the primary purpose -- of a program of searches does not bar the application of the special needs doctrine." *Id.*.

In short, the government's asserted special need "must not be isomorphic with law enforcement needs, but rather go beyond them." *Cassidy*, 471 F.3d, at 81.

Given the foregoing, petitioners are simply wrong when they urge that this appeal poses a question reserved in *Skinner*, 489 U.S. 602 (Pet., at 11-12). As an initial matter, the NYPD stands in the exact same shoes as the private railroad in *Skinner*, because both are employers implementing measures to prevent accidents and casualties. And

just as in *Skinner*, the petitioners here do not seriously contend that IO 52 is a pretext to "enable law enforcement authorities to gather evidence of penal law violations." *Id.* Thus, the only question that the Court "left for another day" is "whether routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext, or otherwise impugn the administrative nature of the . . . program." *Id.* Given that petitioners have no evidence whatsoever of pretext, much less a persuasive showing that IO 52 is pretextual, "the policy must be assessed in light of its obvious administrative purpose." *Id.*

Nor is there is something inherently suspect where, as here, test results may in some cases be used for law enforcement purposes (Pet., at 12-13). The issue is whether law enforcement is the *primary purpose* of the search, as even *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), on which petitioners so heavily rely (Pet., at 13-14), recognizes. In *Ferguson*, the decisive factor was that "the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment." *Id.*, at 83. *See also Dickerson v. Napolitano*, 604 F.3d 732, 750 (2d Cir. 2010)("To determine whether the 'special needs' of the government permit a search that would otherwise be impermissible under the Fourth Amendment, courts first examine whether the search serves as its immediate purpose an objective distinct from the ordinary evidence-gathering associated with

criminal investigations").[4]

Petitioners are equally misguided when they urge that the Second Circuit's opinion conflicts with *Ferguson* (Pet., at 15-22). In fact, the question posed in *Ferguson* was: "whether the interest in using the threat of criminal sanctions to deter pregnant women from using cocaine can justify a departure from the general rule that an official nonconsensual search is unconstitutional if not authorized by a valid warrant." 532 U.S., 70. In *Ferguson*, unlike here, the "immediate" intent was "to prosecute women who tested positive for cocaine while pregnant," *id.*, at 71, and thus, "the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment." *Id.*, at 80.

Additionally, petitioners' reliance on *Ferguson's* "excessive entanglement" language is a red herring. We can all agree that the NYPD is a law enforcement agency, and that, long before IO 52 was ever implemented, the NYPD investigated whenever a member of the service was involved in a shooting. But the NYPD is also an employer responsible for enforcing necessarily strict rules governing, *inter alia*, the use of deadly force by its officers, and that makes NYPD "entanglement" a

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[4] Significantly, petitioners cannot identify even a single instance when an IO 52 breathalyzer test has been used for a law enforcement purpose. Indeed, as of August 8, 2010, there have been 133 breathalyzer tests pursuant to IO 52, and none has resulted in criminal charges.

fact of everyday life when an officer uses his or her weapon. However, the Department's role at the scene of a shooting does not inevitably trump its role as an employer, nor does it mean that every NYPD policy has, as "the central and indispensable feature . . . from its inception" a law enforcement purpose. *Ferguson*, 532 U.S., at 83.

Indeed, the *Ferguson* Court never ruled there was something inherently suspect where, as here, there may be an incidental law enforcement purpose. Rather, in referring to *New York v. Burger*, 482 U.S. 691 (1987), the Court recognized just the opposite. In *Burger*, the Court rejected a contention that a statute authorizing administrative inspections by the NYPD of closely regulated chop shops was in fact "designed to gather evidence to enable convictions under the penal laws" because the "discovery of evidence of other violations would have been merely incidental to the purposes of the administrative search." *Id.*, at n. 21. That same reasoning applies here, where the Department routinely monitors officers very closely, and where officers consequently have a greatly reduced expectation of privacy.

Petitioners urge that IO 52's law enforcement purpose necessarily trumps its other purposes because, according to petitioners, it is the "immediate objective" here (Pet., at 18-21), but that attempt to now discredit the unchallenged evidence in the record does not create an issue worthy of this Court's discretionary review. There is, moreover, nothing in this record to support that assertion other than petitioners' own "interpretation" of IO 52's primary purpose and their shuffling of the purposes for IO 52 that respondents set out in their

cross-motion. Certainly, that sleight of hand falls far short of showing that the purpose of IO 52 is ultimately indistinguishable from a general interest in crime control.

And while petitioners contend that IO 52 is, in practice, implemented too late to protect the public safety, meaning, after the shooting has occurred (Pet., at 21), that ignores the measure's deterrent effect. Thus far, that effect has been quite substantial, given that, after 133 breathalyzer tests, not a single officer has been found to have been impaired. That is exactly the result the Department hopes for, and is certainly not, at any rate, attributable to a law enforcement purpose.

Recognizing that their reading of *Ferguson*'s reach may be overstated, petitioners alternatively urge the Court to nevertheless grant review in order to "clarify whether significant law enforcement entanglement and purpose . . . precludes 'special needs' exemption" (Pet., at 22). That issue, however, is unpreserved for this Court's review. At any rate, given this Court's decision in *New York v. Burger*, 482 U.S. 691, there is no need for such a "clarification," particularly where, as here, the employer imposing the test is the NYPD itself.

In order to argue that there is "disarray" in the state courts regarding the special needs doctrine, petitioners rely on various state cases involving motorists and equally distinguishable local statutes (Pet., at 23-27). As none of those cases involve an administrative personnel initiative applied to employees who, like the officers here, have a diminished expectation of privacy, they are

inapposite, and this proposed interlocutory appeal is therefore ill-suited to resolve those myriad and factually distinct issues.

Petitioners concede that there is no conflict in the federal appellate courts but nevertheless urge there are analogous questions (Pet., at 27-29). However, the factual circumstances are not at all analogous. For example, in *Greene v. Camereta*, 588 F.3d 1011, 1030, n. 17 (9th Cir. 2009), the Court recognized that there were no exigent circumstances surrounding the questioning of the child, but here, the breathalyzer test will be meaningless if NYPD needs to first obtain a warrant (A75, ¶59). Likewise, in *Knox County Education Association v. Knox County Board of Education*, 158 F,3d 361 (6th Cir. 1998), where the Court never even reached the issue, the question was whether the police, acting in a purely law enforcement capacity, could breathalyzer school employees.

Most tellingly, petitioners ask this Court to exercise its *certiorari* review powers based on the wholly speculative "potential" reach of the Second Circuit's opinion (Pet., at 30). A preliminary determination of likelihood of success on the merits is ordinarily considered tentative and therefore has questionable value as precedent. At any rate, the application and issues involving of IO 52 are so fact-specific that the Second Circuit's decision has limited application outside these unique circumstances.

This record demonstrates that mandatory testing serves many important purposes beyond simply determining if a particular officer fired his

weapon while under the influence of alcohol. The goal is to deter officers from alcohol consumption by immediately testing every single time a person is injured or killed in a shooting by a member of the service. Mandatory testing also is the most reliable way to monitor officers and their use of firearms to make sure that no officer uses his or her weapon while impaired because of alcohol consumption.

Equally important, the NYPD should be able to assure the public that alcohol has not played a role in a shooting injury or death. Officers have been entrusted with the authority to use deadly force, and along with that power is a public expectation that it will be very carefully monitored.

Unfortunately, this record demonstrates that alcohol use by police officers is a serious, continuing problem that poses grave risk to the public and other officers. In less than three years, more than 600 officers were interviewed by the Department's Counseling Unit, including 380 new cases (A62, ¶9). During the same time period, 38 off-duty officers were picked up for DWI (A67, ¶21), and there were ten suicides, including four involving alcohol (*Id.*, at ¶22).

As the Second Circuit correctly determined, respondents defeated the motion for a preliminary injunction by demonstrating that IO 52 is minimally intrusive, advances the Department's need to make sure the official use of deadly force is not the result of alcohol abuse, and instills essential public confidence in the police force. That decision is legally correct, and does not conflict with any decision of this Court or of any other state or

federal courts, and it does not otherwise warrant further review by this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

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Respectfully submitted,

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